**TAN KIAN HUA**

**v.**

**COLOUR IMAGE SCAN SDN BHD & ORS (NO 2)**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-26-26-2002]
28 JUNE 2004

***CIVIL PROCEDURE:*** *Execution - Stay - Application for - Special circumstances test - Whether appeal would be rendered nugatory - Merits of application - Balance of convenience*

This was the respondents' notice of motion seeking a stay of execution of the order of this court dated 11 February 2004 pending appeal to the Court of Appeal. This application was directed at the judgment in the case of *Tan Kian Hua v. Colour Image Scan Sdn Bhd* in which the judge ordered "that the 2nd, 3rd, 4th and 5th respondents do, within seven days of the order of this court, give full account and disclosure of the financial transactions by the company from 22 February 2002 to the date of this order." The only issue requiring determination was whether there were valid reasons that would warrant a stay of execution.

**Held (dismissing the application):**

**[1]** The respondents' averments of the petitioner's purported inability to repay the taxed costs to the respondents in the event that the latter was successful in their appeal was nothing more than a mere bare assertion unsupported by other evidence and lacking in precision. Furthermore, the respondents had not alleged in their affidavits that the petitioner was unable to pay its debt or that the petitioner was a bankrupt. (p 547 a-b)

**[2]** The fact that the petitioner was without fixed employment was no indication that he was not without financial means. Paragraph 1 of the petitioner's affidavit put the petitioner as being self-employed. As a Malaysian citizen residing within the jurisdiction of this court, the respondents always had legal recourse available to them to recover the taxed costs in the event their appeal was allowed. (p 547 c)

**[3]** At any rate, the petitioner's financial means to repay the taxed costs in the event that the respondents succeeded in their appeal could not, and should not, constitute a ground for stay. The risk of the dissipation of the money by the petitioner was a universal risk regardless of whether the petitioner was rich or poor, and thus could not constitute special circumstances. (p 547 d-e)

**[4]** The respondents failed to demonstrate that there were merits in their application. On the available affidavit evidence and applying the relevant principles of law, the respondents had failed to meet any of the ingredients justifying a stay of execution. This court had vigorously applied the special circumstances approach in adjudicating this application. It also considered whether the appeal, if successful, would be rendered nugatory and whether the petitioner should be deprived of the fruits of his success. The balance of justice or convenience clearly tipped in favour of the petitioner; the respondents' application for stay ought to be dismissed. (p 549 c-e)

**Case(s) referred to:**

*All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 HC* ***(refd)***

*Bernhardt v. Beau Rivage Pty Ltd [1989] 15 ACLR 160* ***(refd)***

*Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1997] 1 CLJ 70 CA* ***(refd)***

*Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC* ***(refd)***

*Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 FC* ***(refd)***

*Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC* ***(refd)***

*Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA* ***(foll)***

*Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126* ***(refd)***

*Re Telescriptor Syndicate Ltd [1903] 2 Ch 174* ***(refd)***

*Sarwari Ainuddin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 HC* ***(refd)***

*Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (No 2) [2003] 5 CLJ 268 HC* ***(refd)***

*Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors [2004] 6 CLJ 174 HC* ***(refd)***

*Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd [2000] 7 CLJ 385 HC* ***(foll)***

*Tokuhon (Pte) Ltd v. Seow Kang Hong & Ors [2003] 4 SLR 67* ***(refd)***

*Univein Sdn Bhd v. Malaysia Building Society Bhd [2003] 2 CLJ 514 CA* ***(refd)***

*Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC* ***(refd)***

*Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd [2002] 7 MLJ 119* ***(foll)***

**Legislation referred to:**
Companies Act 1965, ss. 181(2)(e), (i), (3), 218(1)(e), 233, 234, 235, 243
Companies (Winding-Up) Rules 1972, rr. 36, 41, 43, 44, 106
Courts of Judicature Act 1964, s. 73
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 89

**Other source(s) referred to:**
Walter Woon & Andrew Hicks, *The Companies Act Of Malaysia, An Annotation*, p 181

*For the petitioner - Wong Rhen Yen; M/s Dennis Nik & Wong*
*For the respondents - Lim Bee Leong; M/s KY Lim & Churme*

*Reported by Suresh Nathan*

## JUDGMENT

**Abdul Malik Ishak J:**

**Preliminary Points**

This was the respondents' notice of motion in encl. 18 seeking a stay of execution of the order of this court dated 11 February 2004 pending appeal to the Court of Appeal. The notice of motion was dated 3 March 2004 and it sought for "tangguh" which meant "adjourn" instead of "gantung" which meant "stay". That was certainly a bad choice of the Malay words and it provoked adverse criticisms from the petitioner's counsel in the person of Mr. Wong Rhen Yen.

To add insult to injury, the respondents' counsel submitted that the notice of motion in encl. 18 was in the nature of the stay of the proceedings instead of the stay of execution. Again, this was nothing more than bad choice of words. Language certainly plays a crucial part in legal practice. As Galen said in his book, *"On the Natural Faculties"*:

> The chief merit of language is clarity, and we know that nothing detracts so much from this as do unfamiliar terms.

After all, a "blow with a word strikes deeper than a blow with a sword" (Robert Burton in the *"Anatomy of Melancholy"*).

I ignored these preliminary points and I proceeded to hear encl. 18 on its merits.

**The Law**

The law books are replete with authorities on the law pertaining to a stay of execution. Suffice for me to say that it is now settled law that an appeal to the Court of Appeal does not operate as a stay of execution or of proceedings of the decision appealed from (s. 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal 1994).

It is now trite law that the respondents must show that there are special circumstances in the present case to warrant a stay of proceedings. An order for stay is generally discretionary in nature and generally made very sparingly and only in exceptional or special circumstances. The court will certainly exercise great care and circumspection so as not to drive the petitioner, being the successful party, from the judgment seat in an application for a stay of execution pending an appeal like encl. 18 (*All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49).

A perusal of the respondents' affidavit, sadly, does not reveal or show any special or exceptional circumstances so as to warrant a stay of execution of the order.

**To The Heart Of The Matter – The Arguments And The Law Thereto**

The application for a stay was directed at my judgment *vide Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors* [2004] 6 CLJ 174 (hereinafter referred to as the "first judgment") and the averments of the respondents in paras. 7(a) and 7(b) of the respondents' affidavit showed, on the balance of probabilities, that the respondents had misconstrued my order pertaining to the disclosure of the financial transactions. What I ordered as per enclosure one (1) at para. 20(1)(ii) was this (see p. 177 and p. 200 of the CLJ reporting of the first judgment):

> that the 2nd, 3rd, 4th and 5th respondents do, within 7 days of the order of this court, give full account and disclosure of the financial transactions by the company from 22.2.2002 to the date of this order.

The order which I made in the first judgment certainly did not require the respondents to provide the audited accounts nor the statement of accounts or profit and loss statements. Incidentally those lucid details can certainly be found in the statutory audited accounts of the first respondent. Moreover, since the first respondent had been wound up there was no necessity for the first respondent's accountant to prepare any accounts. In fact, the accountant together with the directors had no authority to prepare the

accounts. The appointed liquidator in the person of Mr. Wong Weng Foo is the right person to act and he will require the directors of the first respondent to provide the statement of affairs and to prepare the necessary report to be submitted to the court as provided under the Companies Law particularly s. 181(2)(e), s. 181(3) and s. 234 of the Companies Act 1965 as well as rr. 41, 43 and 44 of the Companies (Winding-Up) Rules 1972. It must be borne in mind that I had in my first judgment as reported in the Current Law Journal appointed Mr. Wong Weng Foo as the liquidator of the first respondent – Colour Image Scan Sdn Bhd. Ironically, there was a letter dated 24 February 2004 emanating from the respondents' present solicitors wherein the respondents confirmed that they did not have all the details of the financial transactions but nevertheless they chose to send the same to the first respondent's accountant to be finalised. The petitioner's solicitors had on 26 February 2004 responded and stated unequivocally the petitioner's objection to such a request and, acting prudently and reasonably, the petitioner had agreed to a suspension of this part of the order in the first judgment until 14 March 2004 solely to enable the respondents to comply with the same. Instead of positively responding to the petitioner's magnanimous gesture, the respondents proceeded to file encl. 18 to stay the execution of the order which I granted in the first judgment until the conclusion of the respondents' appeal to the Court of Appeal (see a copy of the respondents' solicitors letter and the petitioner's solicitor's response marked collectively as exh. "TKF2" of the petitioner's affidavit). In any event, it is interesting to narrate the following factual matrix.

That the request for the three (3) months' period to purportedly prepare "the said accounts" was unsupported by any averment from the first respondent's accountant and has to be dismissed. In this connection, the stand of the petitioner was this. That on 16 June 2003 he had sent a letter to the first respondent's accountant requesting for, *inter alia*, the audited accounts but he was informed by the said accountant that they had not received any accounts for the years ended 31 December 2001, 31 December 2002 and 31 December 2003 for auditing purposes. In this regard, it would be ideal to refer to the copy of the petitioner's letter, the copy of the first respondent's accountant's response and the first respondent's company secretary's letter dated 23 June 2003 marked collectively as exh. "TKH3" of the petitioner's affidavit. Now, flowing from all these, it was certainly incontrovertible that the respondents had deliberately withheld the accounts from the first respondent's accountant from being audited for more than two (2) years and yet the respondents are now asking this court to give them another three (3) months to finalise the accounts. It would be germane to mention that despite all these allegations as found in the petitioner's

affidavit, the respondents saw it fit not to rebut those allegations or averments. In *Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd* [2000] 7 CLJ 385, I had occasion to say at p. 399 to p. 400 the following, and that would certainly apply to the present case at hand:

> It must be recalled that the defendant had set out the particulars of fraud in the statement of defence and the counterclaim as alluded to earlier. The same particulars of fraud were also repeated in encl 62. But unfortunately the plaintiff saw it fit not to rebut the particulars of fraud in their encl 60 save as to say that the defendant cannot conveniently turn the affidavit evidence into a mini trial and that the burden of proving fraud was said to be on the higher side namely, beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 121). Ms Annabel CH Chua rightly submitted on the authority of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 that the failure of the plaintiff to contradict an allegation amounted to an admission of the fact so asserted. The failure to rebut the defendant's averments in paras 6, 7, and 8 of encl 61 meant that the plaintiff had admitted to the fact of procuring the contract by fraud. Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900, aptly said:
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> > Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.
> >
> > It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage.
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> In short, the unrebutted affidavit evidence of the defendant clearly showed that the plaintiff had admitted to the existence of the fraud. That being the case, the contract on the strength of the affidavit evidence was void and unenforceable for fraud. This was the submission of Ms Annabel CH Chua for the defendant. It would be ideal that fraud be proved in open court in the course of the trial.

I have no quarrel with the principles of law as re-stated in the following cases:

(1) *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, CA;

(2) *Tokuhon (Pte) Ltd v. Seow Kang Hong and Others* [2003] 4 SLR 67;

(3) *In re Telescriptor Syndicate, Limited* [1903] 2 Ch. 174; and

(4) *Vijayalakshmi Devi d/o Nadchatiram v. Dr. Mahadevan s/o Nadchatiram & 4 Ors.* [1995] 3 CLJ 493, FC.

But, unfortunately, the principles of law re-stated and re-enunciated in these cases were not applied by Mr. Lim Bee Leong when he submitted on behalf of the respondents. With respect, the learned counsel for the respondents merely made references to the judgments of these cases without submitting as to how the decisions in those cases would apply to the facts of the present case at hand. I am of the considered view that the principles of law as set out in these cases would support the petitioner to the hilt. Allow me time to demonstrate.

Paragraphs 7(c) to 7(n) of the respondents' affidavit should be referred to. There the respondents set out the reasons to support a stay of execution of my orders as exemplified in the first judgment. Briefly, these reasons were:

(1) that the first respondent is a solvent company;

(2) that the employees of the first respondent would lose their employments;

(3) that the first respondent would suffer loss of business and profit;

(4) that the first respondent would not be able to pay its creditors; and

(5) that the first respondent's bank account would be frozen.

And, with respect, the above reasons cannot constitute special circumstances so as to warrant a stay of execution. In *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)*, the Court of Appeal had this to say at p. 407 of the report:

> The grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound-up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.
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> The winding-up petition is still pending. The applicant still has every opportunity to contest it.

> Whatever it is, those factors are not 'special circumstances' (if we want to use the term) nor do they show that the appeal, if successful, will be rendered nugatory (if we prefer that term). They are nothing unusual. Execution is a natural process after obtaining a judgment and winding-up is one of them.

Clearly therefore it is incontrovertible that the respondents' fear was focussed on "dollars and cents". It was purely financial in nature. In my judgment, this cannot constitute special circumstances (*Univein Sdn Bhd v. Malaysia Building Society Bhd* [2003] 2 CLJ 514, CA). In *Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119, I had occasion to hold that hardship, inability to further operate its business and the financial burden as claimed by the defendant there fell short of the special circumstances test. At p. 150 of the report, this was what I said:

> (b) Hardship and inability to further operate its business
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> Hardship and financial burden as claimed by the defendant fall short of the special circumstances test *(Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan (Leong Yok Chin Intervener))*. At any rate, it is germane to note that the defendant in its application and in its affidavits have only averred that the execution would disrupt its business. But unfortunately, the defendant failed to explain nor adduce affidavit evidence to show as to how exactly the execution would affect its business (*Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd* [1995] 1 MLJ 339).

In any event, the order that was granted in the first judgment was pursuant to a petition filed under s. 181 of the Companies Act 1965 wherein I had found that the second, third, fourth and fifth respondents were guilty of oppression. Now, this finding must be contrasted with the petition filed under s. 218(1)(e) of the Companies Act 1965 wherein the first respondent's inability to pay its debt or the first respondent's insolvency was a factor to be considered. So, flowing from all these salient facts, the respondents' submissions on the point of solvency were certainly baseless. Going on an uphill task, the respondents cited and relied on the case of *Bernhardt v. Beau Rivage Pty Ltd* [1989] 15 ACLR 160. But, with respect, that case supported the petitioner's petition herein in that the court will order a winding-up on the just and equitable ground. The learned authors in the persons of Walter Woon and Andrew Hicks in their book, *"The Companies Act Of Malaysia, An Annotation"* at p. 181 wrote:

S. 181(2)(e) winding up As to the grounds for winding up, see s. 218.

Section 181 is related to winding up on the 'just and equitable' ground under s. 218(1)(i). Cases decided on the 'just and equitable' rule for winding up a company are equally apt in a s. 181 context: see *Re Novabron Pty Ltd (No 2)* [1986] 11 ACLR 279, 292 per Derrington J. See annotations to s. 218.

Doubtless where the court is inclined to wind up a company under that provision, a less draconian relief under s. 181 may be obtained in lieu. Conversely there may be circumstances in which relief other than winding up would put an end to the oppression but the court considers nonetheless that winding up is a more appropriate remedy: *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129, 131.

A winding up under s181 is treated as a winding up upon the petition of the company: s. 181 (3).

Put briefly, what the learned authors in their book were saying was that a winding-up under the just and equitable ground as set out and envisaged in s. 218(1)(i) of the Companies Act 1965 was related to the provisions of s. 181 of the same Act. Be that as it may, there was an averment by the petitioner in para. 7.7 of the petitioner's affidavit that based on the findings of this court in the first judgment there were oppressive acts committed against the petitioner by the second, third, fourth and fifth respondents. I must say that the orders that flow from the first judgment would certainly benefit the shareholders of the first respondent including the petitioner and the creditors of the first respondent by preserving the assets of the first respondent to be distributed in accordance with the law and it would also allow for investigation of the financial transactions of the first respondent and preventing any assets of the first respondent from being dissipated.

There was reliance by the respondents on the case of *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (No 2)* [2003] 5 CLJ 268, where the lower test of "whether the appeal will be rendered nugatory" was used in an application for stay of proceedings as opposed to the stay of execution. Here, on the other hand, looking at encl. 18 as phrased and framed it was apparent that the respondents were asking for a stay of execution and not for the stay of proceedings. Furthermore, *Sri Binaraya Sdn Bhd (supra)* was decided without taking into account the decisions of the Federal Court in *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 (FC); and *Kerajaan Malaysian v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 (FC). In *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the*

*Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd (supra)*, the special circumstances test was preferred as opposed to the nugatory test. At p. 540 of the report, this was what I said:

> Now, what were 'the more recent authorities' his Lordship Gopal Sri Ram JCA considered in *See Teow Guan*? His Lordship Gopal Sri Ram JCA considered the Singapore High Court decision of Chan Sek Keong JC (as he then was and now the A-G of Singapore) in the case of *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408, the decision of Abdul Hamid J (who rose as LP) in *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 and the case of *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42 to conclude at p 610 that:
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> > If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.
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> With respect, See Teow Guan did not consider the Federal Court cases of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 (FC) and *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 (FC). These two authorities from the highest court in the country, in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a *fortiori* it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

Now, the petitioner's fear of dissipation of assets belonging to the first respondent was compounded by the revelation by the respondents of the existence of a new company or partner of the first respondent, namely, Mutiara Grafik Sdn Bhd (hereinafter referred to as "Mutiara") – see exh. "C" of the respondents' affidavit. The latest search conducted at the Companies Commission showed that the first defendant owns 15% equity in Mutiara while the fifth respondent is a director of Mutiara. It was the stand of the petitioner that the respondents had never, at any time, informed the petitioner of the involvement of Mutiara. For the record, this court too was left in the dark. The respondents had not obtained the relevant resolution nor the shareholders approval to invest in Mutiara. It can readily be surmised that there are many inferences that can be drawn from the deliberate non-disclosure of the involvement of Mutiara. It must be borne in mind that Mutiara was only incorporated on 17 May 2002 and this was after the petitioner was removed as the director of the first respondent. The respondents must be held accountable and by virtue of s. 235 of the Companies Act 1965 they have to answer to Mr. Wong Weng Foo – the

appointed liquidator, who will then submit his findings to the court. There is no prescribed form for the liquidator to prepare his report. Suffice if the liquidator prepares his report in a narrative manner. I am sure that Mr. Wong Weng Foo would act accordingly thereafter.

Of significance would be this. That the respondents have to-date failed to rebut the petitioner's allegations as alluded to above, and this meant that the respondents are admitting the said allegations advanced by the petitioner *(Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd (supra)).*

Even if the respondents were able to contend and did contend that their application in encl. 18 was for the stay of proceedings under s. 243 of the Companies Act 1965, yet the Federal Court case of *Vijayalakshmi Devi d/o Nadchatiram v. Dr. Mahadevan s/o Nadchatiram & 4 Ors. (supra)* would go against them for the following salient reasons:

(a) it is undeniable that the second to the fifth respondents, being directors, have not complied with their statutory duties of giving information to the liquidator or in regard to the furnishing of a statement as to the affairs of the first respondent's company;

(b) it is also undeniable that the second to the fifth respondents have failed to give the full account and to disclose the "financial transactions" by the first respondent from 22 February 2002 to the date of the order;

(c) that there is patently a need for investigation as to the irregularities or misfeasance since the respondents have failed to audit the accounts and to file the statutory audit on behalf of the first respondent for the last three years; and

(d) that there is clearly a need for investigation on irregularities or misfeasance since the respondents have failed to disclose that the respondents had caused the first respondent to invest in Mutiara without any proper resolution and the fact that the fifth respondent is a director of Mutiara which obtains contracts from third parties.

The facts as alluded to above coupled with the conduct of the respondents would certainly justify the need to allow the appointed liquidator in the person of Mr. Wong Weng Foo to continue with his onerous tasks as prescribed under ss. 233 to 235 of the Companies Act 1965 and rr. 36 and 106 of the Companies (Winding-Up) Rules 1972.

I pause here for a moment. I must now proceed further.

Now, the respondents' averments of the petitioner's purported inability to repay the taxed costs to the respondents in the event the latter was successful in their appeal was nothing more than a mere bare assertion unsupported by any other evidence and lacking in precision. Needless to say we have the situation where the petitioner denied and disputed the said allegations. It is germane to mention that the respondents have not in their affidavits alleged that the petitioner was unable to pay its debt or that the petitioner is a bankrupt.

The fact that the petitioner is currently without a fixed employment is no indication that he is not without financial means. Paragraph 1 of the petitioner's affidavit puts the petitioner as presently being self-employed. As a Malaysian citizen and residing within jurisdiction of this court, the respondents have always a legal recourse available to them to recover the taxed costs in the event their appeal was allowed.

At any rate, the petitioner's financial means to repay the taxed costs in the event that the respondents succeed in their appeal cannot and should not constitute a ground for a stay. I must say that the risk of the petitioner's dissipation of the money was a universal risk regardless of whether the petitioner was rich or poor and being a universal risk it cannot constitute special circumstances (*Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [1999] 8 CLJ 534). In *Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd (supra)* at p. 152 to p. 153 of the MLJ reporting, I had this to say:

> (g) That the plaintiff is poor and there is a risk of dissipation
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> Of course, it goes without saying that the alleged poverty of the plaintiff itself does not suffice as special circumstances except where it can be shown that there is no reasonable probability of getting the money back if the defendant succeeds on its appeal. Here, the defendant must adduce affidavit evidence to that effect and the defendant had failed to do so (*Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* at p 44 at paras G-I; and *Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391, at p. 396 at paras F-G). This was a classic case where the defendant merely made bare assertions and bare allegations. There was no affidavit evidence to show that there is a real risk that the plaintiff will dissipate the assets. It is not enough for the defendant to merely allege that the plaintiff is poor. This kind of allegation is tantamount to mere speculation on the part of the defendant.

To confound the matter further, the defendant has neither alleged nor proved that the plaintiff company is insolvent. No evidence, let alone sufficient evidence was adduced by the defendant to show that the plaintiff is insolvent. In the defendant's first affidavit annexing the Registry of Companies search report as exh LAK 4, it shows that the plaintiff is solvent. At any rate, the plaintiff has expressly averred in para 9 of the plaintiff's affidavit in encl 79 that the plaintiff is willing to allow the defendant to make payment into court or to the plaintiff's solicitors as stakeholders until the defendant's appeal to me was disposed off. It must be borne in mind that in the words of Mahadev Shankar J in *Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* at p 397 of the report at para H that:

> … a stay of execution of a money judgment will be automatic in all cases where that money is in court.

Applications like encl. 18 are quite common in our courts. It is a daily occurrence and the law on a stay of execution has since crystallised for everyone to take note of. Factually speaking, the cases I had referred to were entirely different but the principles enunciated in those cases remained vibrant and applicable to encl. 18. I shall now demonstrate:

(1) in the case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)*, the Court of Appeal was dealing with the issue of execution by way of winding-up just like the present case at hand;

(2) in *Univein Sdn Bhd v. Malaysia Building Society Bhd (supra)*, the Court of Appeal was dealing with the foreclosure of a piece of land;

(3) in *Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd (supra)*, the court was concerned with monetary judgment; and

(4) in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd (supra)*, the court was concerned with a case which dealt with the issue of eviction of squatters from a piece of land under O. 89 of the RHC.

Yet in all these cases, despite the differing background facts of each case, the courts had dismissed the respective applications for the stay of the execution and/or the proceedings thereto pending the appeal. To say as was said that the consideration of "nugatoriness" was not addressed by the petitioner's learned counsel to this court was to say an untruth. In fact, the consideration of "nugatoriness" of an appeal being part of the general

consideration of special circumstances can never be overlooked (*Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd (supra)* at p. 148 to p. 150; and *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)* at p. 66 to p. 67; and *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, FC, 16) and a submission to that effect was, in fact, made by the learned counsel for the petitioner.

In my judgment, the respondents failed to demonstrate by affidavit evidence that there were merits in their application in encl. 18. On the available affidavit evidence and applying the principles of law as alluded to above, it was part and parcel of my judgment that the respondents had failed to meet any of the ingredients justifying a stay of execution.

It must be emphasized that I have vigorously applied the special circumstances approach in adjudicating encl. 18. I too have considered whether the appeal, if successful, would be rendered nugatory. In this context, I have also considered whether the petitioner should be deprived of the fruits of his success. I too took into consideration cases like *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126, FC; and *Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd* [1997] 1 CLJ 70, CA.

For the reasons as adumbrated above, I must hold that the balance of justice or convenience clearly tipped in favour of the petitioner and that the respondents' application in encl. 18 for stay ought to be dismissed with costs to be taxed forthwith.